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No. 525

Office Supreme Court, U.S.
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IN THE

# SUPREME COURT OF THE UNITED STATES

ERMA F. SPRINGER, MURL D. SPRINGER, CLARE GOODMAN, FORREST M. E. JOHNSON, ANNA GULCH, Administratrix of the Estate of Stephen Stanley Gulch, Deceased, DOROTHA E. SWARTZ, Administratrix of the Estate of HAROLD SWARTZ, Deceased, and INDIANA LUMBERMENS MUTUAL INSURANCE COMPANY,

*Petitioners,*

vs.

ALLSTATE INSURANCE COMPANY, an Illinois corporation,

*Respondent.*

## PETITIONERS' REPLY BRIEF

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## PETITIONERS' REPLY BRIEF

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To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

## ARGUMENT

### SUFFICIENCY OF EVIDENCE TEST

In its brief, Respondent claims that the federal test on sufficiency of evidence should be applied in a diversity of citizenship case even though the state rule on sufficiency be different (R. Br. 2). Petitioners contend that the state test, not the federal rule, should be applied (P. Br. 5). Respondent does not dispute petitioners' assertion that the Michigan rule on sufficiency of evidence requires any evidence "however slight" to be submitted to the jury. Thus, the opportunity is presented to this court to resolve the present conflict of decisions in the several Circuit Courts of Appeals and to determine the issue as to whether the state rule or federal test on sufficiency of evidence should be applied in a diversity of citizenship case (P. Br. 5-7).

## ISSUE OF FACT ON SPECIAL INTERROGATORIES

Respondent's assertion of facts, when supported by page references to the record, set forth only such facts in the light most favorable to respondent insurer, contrary to the findings of the jury (294-5a).

For example, on page 6 of its brief respondent alleges that "When the Springers were informed that the company charged that they had made false answers in the policy declarations, they made no denial or protest" and refer to 109a of the Record. Actually that citation refers to only Mr. Springer's testimony (not the insured) and only a part thereof supports the assertion. Murl D. Springer testified:

> "Q. Then you never made any complaint to any office[illegible] or agent of the Allstate Insurance Company, about the charges contained in that notice?
>
> "A. No, sir; *but I tried*" (109a).

The *insured*, Mrs. Springer, testified that she protested to Mr. Marks, adjuster for the Respondent-insurer as follows:

> "I said, 'Why, Mr. Marks, are you trying to tell me that I am not insured, after having this policy for nearly two years, paying for it on two different occasions * * *? I can't understand it * * * When we need you so bad now, there has two people been killed * * *.' He said: 'When it is only three or four thousand dollars, the company does pay off, but when it comes up to $40,000 claims we get out by hook or crook" (238a).

Many of respondent insurer's assertions of fact are not supported by the record and contain no page references thereto contrary to Rule 40 (R. Br. 5, 6). For example, the following assertions of fact quoted from page 6 of insurer respondent's brief, unsupported by page references to the record, are simply not correct.

> "When Mrs. Springer received the notice declaring the policy void, and the check for the refund of the premiums, she understood their purpose. * * *
>
> "Mrs. Springer recognized Allstate's right to rescind by accepting the return of all premiums paid by

her accompanied by a written denial of liability, and by her retaining such premiums."

The proof is undisputed that Mrs. Springer, the insured, never saw the check until it was produced in court the day of the trial of this case (240a). She had never read the letter (252a). Mr. Springer (who was not the insured) had opened the letter addressed to Mrs. Springer (the insured), had forged her signature to the check, and cashed it about two days before Christmas (240a). Premium refund was tendered back to respondent before trial and is on deposit with the clerk of the District Court (33a).

## COUNSEL DID NOT COMPLY WITH RULE 51

Counsel's exceptions to the trial court's denial of requests to charge and the court's refusal to grant its motions for directed verdict or for judgment notwithstanding the verdict can in no way excuse *counsel's failure to object to the charge as given*, including the three interrogatories upon which the Court of Appeals reversed the District Court judgment. This is particularly so, where the trial court specifically requested counsel to object to the charge as given:

> "THE COURT: Mr. Rogoski, • • • you should also state on the record your objections to the instructions *which the court did give*" (292a).

While this error was first presented to the Court of Appeals in our Petition for Re-hearing, respondent claimed throughout the appeal that no issues of fact existed for the jury. No need arose to point out the error until the Court of Appeals' reversal was predicated unexpectedly upon the trial court's charge as given. To give the Court an opportunity to correct this error, petitioners first filed a petition for re-hearing in the Court of Appeals rather than proceeding directly with a Petition for Certiorari in this Court.

This case is typical of a few recent decisions in which Courts of Appeals have failed to heed the admonition of this Court only recently reaffirmed in *Daniel J. Scutiles vs. Inter-Carribean Corporation*, decided November 23, 1959:

"'It is not the function of a court to search the record for conflicting circumstantial evidence in order to take the case away from the jury on a theory that the proof gives equal support to inconsistent and uncertain inferences. The focal point of judicial review if the reasonableness of the particular inference or conclusion drawn by the jury. * * * The very essence of its function is to select from among conflicting inferences and conclusions that which it considers most reasonable. * * * Courts are not free to reweigh the evidence and set aside the jury verdict merely because the jury could have drawn different inferences or conclusions or because judges feel that other results are more reasonable.'"

WHEREFORE, it is respectfully submitted that petitioners' prayer for a writ of certiorari to review the judgment of the Sixth Circuit Court of Appeals should be granted.

Dated: December 11, 1959.

Respectfully submitted,

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